

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
DEC 08 2003

Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES
LITIGATION

§ MDL 1446

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This Document Relates To:

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MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

§

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Plaintiffs,

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Civil Action No. H-01-3624
and Consolidated, Related
Coordinated Cases

§

vs.

§

§

ENRON CORP., et al.,

§

§

Defendants.

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**OPPOSITION OF THE DEUTSCHE BANK ENTITIES TO
CERTAIN OFFICER DEFENDANTS' MOTION TO COMPEL DEUTSCHE BANK
ENTITIES TO RESPOND TO REQUEST FOR PRODUCTION**

Deutsche Bank AG ("DB"), Deutsche Bank Trust Company Americas (formerly known as Bankers Trust Company) ("DBTC"), and Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI")¹ (collectively, the "DB Entities"), respectfully submit the following opposition to certain officer defendants'² Motion to Compel Deutsche Bank Entities to Respond to Requests for Production.

¹ DM Alex Brown LLC and DB Alex Brown LLC are not legal entities capable of being sued or served with a request for production. See Olsen Aff. Ex. 1 ¶ 5; see also Davis v. Raney Auto Co., 249 S.W. 878 (Tex. Civ. App. 1923) ("It is elementary that suit can be maintained by and against only parties having an actual or legal existence.").

² Cindy Olson, Lawrence G. Whalley, Mark A. Frevert, Mark E. Koenig, and Steven J. Kean (the "Officer Defendants").

INTRODUCTION

On December 19, 2002, this Court dismissed DB entirely from the Newby action. In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 708 (S.D. Tex. 2002) (hereinafter the “December Order”). On April 24, 2003, this Court decided the remaining motions to dismiss the Consolidated Complaint and lifted the discovery stay under the Private Securities Litigation Reform Act (“PSLRA”). None of the DB Entities were a party to Newby at the time that this Court lifted the PSLRA stay. On May 14, 2003, plaintiffs filed their First Amended Consolidated Complaint (the “Amended Complaint”) in Newby. The Amended Complaint renamed DB and added DBTC and DBSI as defendants. On June 6, 2003, this Court granted plaintiffs leave to amend the Consolidated Complaint, and stated that DB could move to dismiss the Amended Complaint once they had been served. June 6, 2003 Order at 2. Since DB was no longer a party to the Newby action, and DBTC and DBSI were newly added parties, plaintiffs were required to **formally serve** the Amended Complaint on each DB Entity or to obtain waivers of service. Each DB Entity waived formal service of the Amended Complaint.

On June 27, 2003, this Court further clarified its April 24, 2003 decision, explaining that “[t]he *survival of claims against all current Defendants* in the consolidated actions beyond the initial round of motions to dismiss has established that Lead Plaintiff has stated claims against *each one of them* and is entitled to go forward.” June 27, 2003 Order at 3 (emphasis added). DB was *not* a “current Defendant,” because *none* of plaintiffs’ claims against DB in the Consolidated Complaint survived. Furthermore, *none* of the plaintiffs in the consolidated actions have stated a claim against any DB Entity. Therefore, this Court’s order by its own terms did not apply to the DB Entities.

On August 20, 2003, the DB Entities filed a motion to dismiss the Amended Complaint, thereby triggering the PSLRA discovery stay. The DB Entities' motion to dismiss the Amended Complaint is still pending before this Court.

On August 21, 2003, the Officer Defendants served the DB Entities with Requests for Production of Documents. In a letter dated September 24, 2003, counsel for the Officer Defendants again requested that the DB Entities produce documents. In a letter dated September 30, 2003, counsel for the DB Entities explained that they would not be producing documents due to the PSLRA stay in effect.

The Officer Defendants did not contact counsel for the DB Entities "in person or by telephone" as required by IV(d) of this Court's local procedures. See also LR7.1. In fact, the Officer Defendants nowhere claim that they complied with this Court's local procedures by contacting counsel for the DB Entities by telephone or in person or that they made a "good faith effort to resolve[] the matters in dispute" before involving this Court. Rather, the Officer Defendants only sent written correspondence to the DB Entities. Moreover, the Officer Defendants never responded to the DB Entities letter dated September 30, 2003. Instead, 49 days later, without any further correspondence or communication, the Officer Defendants filed this motion to compel. Under this Court's rules the Officer Defendants' motion is premature and can be denied on that basis alone. Regardless, the discovery stay under the PSLRA protects the DB Entities from all discovery requests while their motion to dismiss is pending.³

³ Consistent with their position that the PSLRA stay is in effect with respect to the DB Entities, the DB Entities have not yet produced nor propounded any discovery in *Newby* or the consolidated and coordinated actions before this Court. In fact, the only Enron-related discovery provided by the DB Entities in any federal proceeding was the Rule 2004 discovery that was **ordered** by the Enron Bankruptcy Court as to the Enron Examiner. That discovery was conducted for a different and more limited purpose, and could not affect a waiver of the PSLRA stay. Indeed, Judge Gonzalez has just confirmed that limited and special purpose by ruling that sworn statements and interview notes taken by the Examiner are protected from discovery by the *Newby* plaintiffs.

DISCUSSION

The DB Entities were *not* parties to this action when this Court lifted the PSLRA discovery stay on April 24, 2003. It is undisputed that this Court dismissed DB entirely from this action on December 19, 2002. December Order, 235 F. Supp. 2d at 708. It was not until May 14, 2003, that plaintiffs renamed DB, and added DBTC and DBSI as defendants in the Amended Complaint.

Pursuant to Section 78u-4(b)(3)(B) of the PSLRA, “all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.” Newby v. Enron Corp., 338 F.3d 467, 470 n.1, 471 (5th Cir. 2003). The Officer Defendants do not claim that their particularized discovery is necessary to preserve evidence or prevent undue prejudice to them.

Since the DB Entities’ Motion to Dismiss the Amended Complaint is still pending before this Court, they are protected from all discovery under the PSLRA discovery stay. See, e.g., In re CFS-Related Sec. Fraud Litig., 213 F.R.D. 435 (N.D. Okla. 2003) (even though the PSLRA stay had been lifted as to other defendants, stay remained in effect as to the third-party defendants against whom no claim had not been stated); In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100 (D. Mass. 2002) (discovery allowed to proceed *only* as to those defendants against whom plaintiffs had stated a claim).

Thus, the mere fact that the PSLRA discovery stay was lifted as to certain defendants against whom plaintiffs had stated a claim in *no way* affects the rights under the PSLRA of the DB Entities against whom plaintiffs have *not* stated a claim. Accordingly, because *none* of the

plaintiffs in the consolidated actions have stated a claim against a DB Entity, the PSLRA mandates that all discovery be stayed as to the DB Entities.

CONCLUSION

For the reasons stated above, Deutsche Bank AG, Deutsche Bank Securities Inc. and Deutsche Bank Trust Company Americas, respectfully request that this Court deny the Officer Defendants' Motion to Compel Deutsche Bank Entities to Respond to Requests for Production while the discovery stay under the PSLRA remains in effect.

Dated: December 8, 2003

Respectfully submitted,

BERG & ANDROPHY

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Attorneys for the DB Entities

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	MDL Docket No. 1446
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MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
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Plaintiffs,	§	Civil Action No. H-01-3624
	§	and Consolidated, Related and
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	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
	§	

AFFIDAVIT OF SONJA K. OLSEN

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

I, SONJA K. OLSEN, hereby declare as follows:

1. I am an Assistant Secretary of Deutsche Bank Securities Inc., a corporation duly organized and existing under the laws of the State of Delaware ("the Corporation") and having its principal place of business at 60 Wall Street, New York, NY 10005.
2. On or about June 4, 1999, BT Alex. Brown Holdings Incorporated transferred ownership of BT Alex. Brown Incorporated to Deutsche Bank Securities Inc.
3. On or about December 3, 1999, BT Alex. Brown Incorporated converted into a Delaware limited liability company named DB Alex. Brown LLC.

4. On or about January 12, 2001, Deutsche Bank Securities Inc. merged with and into DB Alex. Brown LLC. Deutsche Bank Securities Inc. was the surviving company, and it changed its name to Deutsche Banc Alex. Brown Inc. The ownership of the now existing Deutsche Banc Alex. Brown Inc. changed to DB U.S. Financial Markets Holding Corporation.

5. Subsequent to January 12, 2001, there has been no entity registered under the name Deutsche Bank Alex. Brown LLC. There is not now, nor has there ever been, any business entity registered under the name DM Alex Brown LLC.

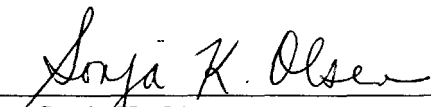
6. Attached hereto and incorporated by reference as Exhibit A is a true and correct copy of the Restated Certificate of Incorporation of the Corporation, as filed with the State of Delaware Office of the Secretary of State on February 8, 2001.

7. Attached hereto and incorporated by reference as Exhibit B is a true and correct copy of the Certificate of Amendment of the Corporation, as filed with the State of Delaware Office of the Secretary of State on March 8, 2002, which states that the name of the Corporation shall change to Deutsche Bank Securities Inc., effective on March 29, 2002 at 5:00 p.m.

8. Attached hereto and incorporated by reference as Exhibit C is a true and correct copy of the Certificate of Merger of the Corporation, as filed with the State of Delaware Office of the Secretary of State on October 31, 2002, which states that Deutsche Bank Futures Inc. merged into the Corporation, effective 11:59 p.m. on November 1, 2002.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said
Corporation as of the 5th day of December, 2003.

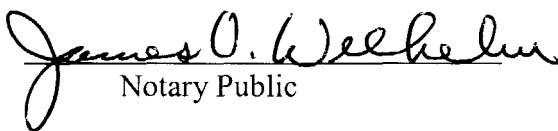
(S E A L)



Sonja K. Olsen
Assistant Secretary
Deutsche Bank Securities Inc.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Sworn to before me this
5th day of December, 2003



Notary Public

JAMES O. WILHELM
Notary Public, State of New York
No. 4726413
Qualified in New York County
Commission Expires May 31, 2006

The Exhibit(s) May
Be Viewed in the
Office of the Clerk